IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 3, 2009 Session

IN RE Ella H.

Appeal from the Juvenile Court for Williamson County
No. 61354 Joshua Lee Rogers, Judge

No. M2009-00739-COA-R3-JV - Filed March 30, 2010

In an action to establish paternity and provide for child support, Father challenged the trial court's personal and subject matter jurisdiction and alleged the forum was not a convenient one. The trial court found against Father on all three arguments, found that Father was the biological father of the child, and established child support. Father appealed, raising the lack of personal and subject matter jurisdiction and invoking the forum non conveniens doctrine. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, J., joined.

David H. King, Franklin, Tennessee, for the appellant, Harris F.

Lori Thomas Reid, Franklin, Tennessee, for the appellee, Holly H.

OPINION

BACKGROUND

This is an action to establish paternity and provide for child support. This appeal, however, is not about the merits but rather matters concerning the trial court's jurisdiction.

Ella H. was born in Mississippi in 2004. Her parents were not married. Ella and her mother, Holly H. ("Mother"), moved to Williamson County, Tennessee, in January 2005. On December 19, 2007, Mother filed a petition to establish paternity and set child support. A summons and the petition were sent to Harris F., the putative father ("Father"), in

Mississippi via FedEx, and the envelope was signed for by S. Sartin at Father's employer's office. No one now argues that this was proper service.

Written discovery requests were sent by Mother to Father in the middle of January 2008. Mother filed a motion for a default judgment at the end of January 2008. Father, who apparently had notice of the petition, hired attorney Gerald Braddock of Jackson, Mississippi. Braddock contacted Mother's attorney and reached an agreement to move the hearing on the default motion from February 22, 2008, to April 4, 2008. Mother's attorney also thought that Father's attorney had agreed to provide the requested discovery by March 10, 2008. When the discovery was not supplied, Mother's attorney filed a motion to compel discovery on March 12, 2008.

On April 7, 2008, Father's second attorney, Deana Hood, filed a motion to dismiss the paternity petition based on (1) lack of subject matter jurisdiction, since Mother and child had moved back to Mississippi, (2) lack of personal jurisdiction, since Father had no connection with Tennessee, and (3) insufficiency of service of process, alleging that Father had not been served in accordance with the Tennessee Rules of Civil Procedure. Hood also filed a response to the motion for default. Soon thereafter, on April 14, 2008, Hood moved to withdraw.

A hearing on the various motions was held April 18, 2008, before the Williamson County Juvenile Court referee. The referee heard the testimony of Mother and the arguments of counsel. By order entered May 2, 2008, Hood's motion to withdraw was granted, and the motion to dismiss the petition to establish paternity was denied as Father did not appear and no one appeared on his behalf. The order also granted the motion for default and found that Father was the legal and biological father of Ella. Father was ordered to pay $2,100.00 per month in child support beginning May 1, 2008. Mother was granted a judgment of $29,400.00 for back child support plus statutory interest, $3,900.06 for medical bills, and $2,500.00 for attorney's fees.

Father's third attorney, Lance Mayes, filed a Tenn. R. Civ. P. 60 motion on September 5, 2008, to set aside the order of May 2, 2008, setting paternity and child support. The motion alleged a lack of jurisdiction over Father, a lack of subject matter jurisdiction, and insufficient service of process. After a hearing on the Rule 60 motion on October 17, 2008, the referee ordered the parties to file additional briefs on the issue of personal service. At that hearing, Mayes was served with the petition to establish paternity and to set child support. The referee's December 12, 2008 order found that the court had subject matter jurisdiction but that Father had not been properly served until the October 17, 2008 hearing, when Father's attorney was served after he stated he could accept service. The May 2, 2008

order was declared void, discovery was ordered to be completed by January 30, 2009, and a final hearing was set for February 27, 2009.

Some arguments over discovery followed. Then, Mayes filed a motion to withdraw and an answer to the petition with the affirmative defenses of lack of subject matter jurisdiction and lack of personal jurisdiction.

The final hearing was held before the referee on February 27, 2009. Mayes argued his motion to withdraw, which was granted. No one appeared to represent Father. Mother testified. In the trial court's March 5, 2009 order, based on Father's admission in his answer, Father was found to be the father of Ella. Father was ordered to pay $1,780.00 per month in child support. He was also ordered to pay $106,800.00 in back child support at $220 a month, $3,900.00 for medical bills and birthing expenses, and $9,000.00 in attorney's fees.[1] Father appealed.

STANDARD OF REVIEW

This court reviews the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence shows otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993).

ANALYSIS

Actions to determine parentage and child support where the parents reside in different states are governed by the Uniform Interstate Family Support Act ("UIFSA"). Tenn. Code Ann. § 36-5-2301(b)(1) & (6). The UIFSA also governs issues of jurisdiction. Tenn. Code Ann. §§ 36-5-2201 & 36-5-2301(b)(7).

Father maintains that the trial court lacked in personal jurisdiction. Tenn. Code Ann. § 36-5-2201(1) indicates that in a proceeding to establish support or determine parentage, the court may exercise personal jurisdiction over a nonresident individual if "[t]he individual is personally served with notice within this state." Father brushes by this provision in his brief, stating that he was not personally served within the state. Mother's argues that the trial court had jurisdiction because "on October 17, 2008, counsel for [Father], Mr. Mayes, announced to opposing counsel and the Juvenile Court of Williamson County, Tennessee, that he was authorized to accept a copy of the Petition. That same day, Mr. Mayes accepted service on behalf of [Father]." Father asserts that "counsel for the Respondent agreed to accept a copy

[1]The findings were confirmed by the juvenile court judge in an order of March 23, 2009.

of the answer for the 'purpose of filing his affirmative defenses and answer.'" He cites to the trial court's opinion on the Rule 60 motion and to the fact that the lack of personal jurisdiction was raised in Father's answer.

The trial court's opinion on the Rule 60 motion states:

> During the hearing on October 17, 2008 counsel for the Respondent stated that he would now accept service of process on behalf of the Respondent; therefore, the Petitioner is authorized to serve a copy of the Petition previously filed in this matter on counsel for the Respondent. This matter shall be set for a final hearing on February 27, 2009. All discovery is to be completed by January 30, 2009.

The trial court found Mayes' agreement to accept service to be unrestricted; it clearly thought the service on Mayes would lead to discovery and a final hearing. The record contains no transcript or statement of the evidence, so we do not know exactly what Mayes said. Since "we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings," *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992), the argument that the agreement to accept service was limited must fail.

Because it is undisputed that Father's attorney accepted service on Father's behalf in Tennessee, Father was served in this state, and the personal jurisdiction requirement is satisfied.

Father raised the issue of subject matter jurisdiction three times in the trial court. The first time was in a motion to dismiss, which was never heard because Father's attorney, Deana Hood, withdrew and no one else, neither another attorney nor Father, appeared at the hearing to address it. The third time subject matter jurisdiction was raised was as an affirmative defense in Father's answer. That defense was never argued because Father's attorney, Lance Mayes, withdrew and no one else, neither another attorney nor Father, appeared at the hearing to address the issue.

The only time subject matter jurisdiction was argued to the court was the second time it was raised in the Rule 60 motion and hearing. In the referee's order, he notes that Father "admits that the mother and child resided in Williamson County at the time of the filing of the Complaint and acknowledged that Tennessee was considered the home state of the minor child at the time the Petition was filed." No facts were in the record to support Father's argument of lack of subject matter jurisdiction, and he admitted to facts that did not support it. It is no surprise that Father's motion on this point was denied.

Nevertheless, Father maintains that because he raised a "factual challenge"[2] to the subject matter jurisdiction of the court, the trial court was required to make a determination as to whether subject matter jurisdiction existed. *Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006). Yet, two of the times that Father had an opportunity to put forth facts in support of his position, he did not even appear by himself or through counsel and did not submit any affidavits or other evidence. We do know that Mother testified at those two hearings, on April 18, 2008, and February 27, 2009, but we do not know the substance of that testimony because Father, as appellant, has not supplied a transcript or a statement of the evidence.[3] The only time the issue was argued Father offered no facts to back up his argument and refute the admitted facts. Arguments of counsel are not evidence. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). Under the facts in the record, the trial court properly determined that it had subject matter jurisdiction.

Finally, Father argues that the trial court abused its discretion when it refused to decline to exercise its jurisdiction due to the inconvenience of the forum. The UIFSA contains no inconvenient forum provision, unlike the Uniform Child Custody Jurisdiction and Enforcement Act. *See* Tenn. Code Ann. § 36-6-222. Nevertheless, the courts of this state have the inherent power to utilize the doctrine of forum non conveniens to refuse to exercise jurisdiction over a cause of action. *Zurick v. Inman*, 426 S.W.2d 767, 772 (Tenn. 1968). The doctrine addresses the discretionary power of a court to decline to exercise jurisdiction when it appears there is another place where the case may be more suitably or conveniently tried. *Luna v. Sherwood*, 208 S.W.3d 403, 405 (Tenn. Ct. App. 2006). The doctrine of forum non conveniens is based on a court having both personal and subject matter jurisdiction and there being at least one other jurisdiction where the case could be brought. *Zurick*, 426 S.W.2d at 771.

We have already found personal and subject matter jurisdiction. Father's argument is based on there being another, more convenient jurisdiction in which to try the case because Mother and Ella moved back to Mississippi during the pendency of the case. The one time the issue was actually presented to the trial court, during the Rule 60 motion hearing, the court observed that there was no evidence in the record supporting this claim. As we noted earlier, arguments of counsel are not evidence. *Roberts*, 755 S.W.2d at 836. Since there was

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[2]"A factual challenge denies that the court actually has subject matter jurisdiction as a matter of fact even though the complaint alleges facts tending to show jurisdiction." *Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006).

[3]Normally, without at least a statement of the evidence, "we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod*, 849 S.W.2d at 783. However, the trial court made no factual findings in these two instances because no one appeared to put forth Father's argument.

no evidence supporting the claim of an inconvenient forum, the trial court could do nothing other than deny Father's motion in that regard. There is no abuse of discretion. "Stated in another manner, the trial judge had no facts before him upon which he could exercise his discretion." *Zurick*, 426 S.W.2d at 775.

The trial court is affirmed in all respects. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE